No. 214.

Supreme Court of

Filed Oct.

THE NORTHERN PA
WAY COMP

v.

WILLIAM V. MYERS,
JEFFERSON COUNTY,

Appeal from the Uni
of Appeals for

REPLY BRIEF

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GIBSON BROS., PR

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Britton, ... of the United States. ... Appellant.

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FOR APPELLANT.

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PRINTERS AND BOOKBINDERS.
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APPELLANT,
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REPLY BRIEF FOR APPELLANT.

The brief for appellee somewhat misapprehends and therefore confuses the argument of appellant.

The Act admitting Montana, approved February 22, 1889 (25 Stats. 676), provides in Section 4, among the binding ordinances to be incorporated in the Constitution thereof, (*inter alia*) as follows:

"That no taxes shall be imposed by the States on lands "or property therein belonging to or which may hereafter "be purchased by the United States or reserved for its "use."

The Constitution of the State of Montana therefore exempts "the property of the United States" from taxation; and the question here involved is whether certain specific subdivisions of land are so the property of the United States as *not* to be subject to taxation, or are so the property of the Railroad Company as to be subject to taxation. The lands are concededly within the geographical limits of the grant of Congress to the railroad appellant; but mineral lands are in terms *excluded* from said grant, and Congress has created a special Executive tribunal to classify, within a prescribed time, the mineral lands within said geographical limits, and has provided:

"That no patent or other evidence of title shall be issued or delivered to said Northern Pacific Railroad Company for any land in said land district, until said land shall have been examined and classified as non-mineral, as provided for in this Act, and such patent or other evidence of title shall only issue then to such land, if any, in said Land District as said Company may be by law and compliance therewith, and by the said classification, entitled thereto, *and any* patent certificate or record of selection, or other evidence of title or right to possession of any land in said Land Districts, issued, entered or delivered to said Northern Pacific Railroad Company in violation of the provisions of this Act shall be void."

Act, Feb'y 26, 1895 (28 Stats. 683).

This specific tribunal to classify is in the active exercise of its jurisdiction over these lands, some of which they have determined to be mineral, but much the greater part of which they have not yet examined and classified. The time fixed by Congress for such classification has not yet expired.

The appellant upon this state of facts contends that, as mineral lands never pass under the grant, and as the

statutory determination as to which of these lands are mineral is still in process of adjudication by a tribunal of exclusive jurisdiction (the acquisition of title by the railroad being in the meanwhile prohibited), such *lands*, as distinguished from a mere claim to land or possessory right thereto, are not subject to the taxation herein complained of.

Against this contention appellee argues in effect, that the grant to appellant is in *præsenti*, and is made certain as to particular tracts by definite location; that as appellant exercises ownership so as to mortgage and so as to maintain ejectment, its title is subject to taxation; that whilst Executive classification of such lands is conclusive, in absence of fraud, yet that judicial determination of their mineral or non-mineral character would be controlling as to their taxability, and that the uncertainty arising from the undetermined character of the lands affords no relief from taxation.

In reply to appellee it is respectfully submitted:

1. Definite location is merely a method of identification. So also is official classification, such as the Act of February 26, 1895, prescribes. Definite location gives precision upon the earth's surface to the particular subdivisions falling within the geographical limits of the grant. Classification gives precision to the *character* of lands granted or excluded therefrom, whether mineral or non-mineral. All odd-numbered sections of public lands within the prescribed limits, except mineral, are granted, but with reserved right of disposition by the United States until definite location, but mineral lands are *not* granted, and the question of final determination thereof was left by the decision of this Court in Bardon case, 154 U. S. 288, and under the terms of fhe grant, until issue of patent, and by the Act of Congress of February

26, 1895 (in exercise of the reserved right of Congress to "alter, amend, or repeal" the grant), to the determination of a special Executive tribunal thereby created.

Now lands, whose general locus has been fixed by definite location, and as to whose subjection to the grant in all other respects there is no question, are not subject to taxation by the State, if unsurveyed. That is so because it cannot be absolutely determined until survey whether they are odd or even numbered sections. Why does not the same exemption from taxation obtain, if, as to lands excluded by character from the grant, that character has not been determined, though in process of determination by a tribunal of exclusive jurisdiction? In either case, is not the precision or identification of the thing granted so essentially lacking as to take them as specific subdivisions of *land* outside of such an ownership as to be the subject of local taxation? Especially so, when the statute reserving exclusive authority to determine character of land, and to thus identify the sections or the parts of sections granted, prohibits evidence of title to the railroad, and declares that any title given anterior to final classification shall be null and void.

2. It is no sufficient answer to say, that the railroad exercises acts of dominion over these lands by mortgage, and by ejectment suits; and that as the State aids it in securing peaceful enjoyment and possession, the Railroad should cheerfully bear its proportional burden of that taxation.

The railroad undoubtedly had an undetermined claim to these lands, and that claim was the lawful subject of mortgage and of ejectment proceedings. If the State law had provided for taxation of the possessory right or the claim of the Railroad, there could have been no valid objection to such exercise of taxing power.

The State law might perhaps have taxed the whole grant within its limits as an entirety, and that might have been sustained as in effect a tax upon the *claim* to the whole grant. But when the State law imposes the tax upon specific subdivisions, not as possessory rights or as claims, but as *lands*, and those lands have not yet been determined by the proper tribunal to be the property of the railroad, and its right to any evidence of title has been expressly suspended by the grantor, the case assumes an entirely different aspect. For illustration: mineral locations not entered or patented under the United States mining Statute, are mere possessory claims. They are, however, the lawful subject of inheritance or sale, or other incidents of ownership as against all the world, except the United States. As such possessory claims, they and the improvements thereon are taxable. But that does not permit taxation of the mining ground, *as land*, and any such attempted exercise of the taxing power of the State or any sale thereunder would be void.

The uncertainty arising from the undetermined mineral character of the land and the unexecuted and exclusive jurisdiction of a special tribunal to make such determination should control this alleged power of taxation of specific subdivisions *as land*. The State can enact proper laws for the taxing of the claim or possessory right of the railroad company; and that would better promote just and fair result, because the question of the value of such *claim* would then be the necessary basis for taxation. The Railroad Company would not therefore under proper law escape its due proportion of taxation. But when the State goes further and taxes *land* in the indeterminate condition as to title of the tracts here in controversy, it should be restrained by equity. It is not sound argument to urge, as the State does, that the taxing power should be exer-

cised, because if the land proves to be mineral the tax is void and no one is hurt. It is better to say that if the lands are mineral they should not have been taxed at all, and hence, that until their mineral character is settled, in the way prescribed by statute, the taxing power should not be exercised. No sound exercise of legal power can be justly put upon an obvious injustice. It cannot be denied that the imposition of this tax puts the Railroad Company between "Scylla and Charybdis." If they pay and lands are subsequently determined to be mineral, the Company has an utterly inadequate remedy for the recovery of the money paid, if, indeed, it has any remedy. If it does not pay, and lands are subsequently classified as agricultural, all cla m or title thereto has been sold away beyond possibility of recovery.

This principle is directly recognized and enforced by the State in the identical lists in controversy, because repeated subdivisions are returned therein without valuation, and in lieu thereof the tracts are marked as "in contest.' (Supplement to Record, pages 2–10.) This list shows twenty-five separate instances of this character.

If then the State exempts from taxation lands claimed by the Company, simply because such tracts are in contest between the Company and individuals, the principle which she thus concedes must be applied with far stronger reason where the United States, as grantor, has by statutory enactment challenged the character of all odd-numbered sections within the mineral region or belt covered by the classification act, and in the exercise of undoubted power has set on foot special and exclusive Executive machinery to determine tract by tract what lands therein are mineral in fact, and thus remain the property of the United States, because never granted to the Company, and

what lands are in fact agricultural, and hence fall within the railroad grant. In other words, if the State recognizes and enforces exemption of lands originally granted to the railroad, but subsequently *claimed* to be *excepted* therefrom by reason of sales or filings after grant and prior to location under the reserved power of disposition by the grantor, how much stronger would the right of exemption be in the case of lands whose inclusion in the grant at all was being contested by the grantor?

In *Ankeney* v. *Clark*, 148 *U. S.* 358, this Court held, as to this same land grant, that

"If we are right in the conclusion, that the defendant's "title to the land in dispute was imperfect, and subject "to be defeated by the United States in asserting their "right to be paid the costs of survey, it is not necessary "to consider whether the defendant made a proper ten- "der of a deed of conveyance, or whether the deed was in "the form called for by the contract, or whether the plain- "tiff waived a tender of the deed."

If the mere possibility that title under the railroad grant *might* fail through failure to refund to the United States surveying expenses was sufficient to defeat a contract for a title to a tract of land actually granted, then *a fortiori* why is not a title, which by subsequent decision of a court of exclusive jurisdiction might prove never to have been granted, sufficiently indeterminate to be exempt from taxation as land?

Respectfully submitted.

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